BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DAWN R. WINTERS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,055,285
BRAUMS, INC. #135	)	
Respondent	)	
AND	)	
	)	
BRAUMS, INC.	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the December 9, 2011 preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

The Administrative Law Judge (ALJ) found that claimant's accident did not arise out of and in the course of her employment and denied the request for benefits.

The claimant requests review of the ALJ's Order arguing that he erred in his finding that her accident did not arise out of and in the course of her employment, when she was on an errand for her employer at the time of the accident. Therefore, claimant argues the Order should be reversed.

Respondent argues that the ALJ's Order should be affirmed as claimant was not on an errand for respondent. She was, instead, on a personal errand during an authorized 30-minute break.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant was working for respondent as an assistant manager in training. Her supervisors were Amber Cardwell and Erica Benner Garrity. Claimant's work hours were 2:00 pm to close, which is 10:30 pm for the public and then for management another 30 minutes to several hours.[1]

On February 23, 2011, claimant was working with Erica Benner Garrity. Claimant testified that Erica gave her $20 and asked her to go and get drinks at Sonic. Claimant asked if she was to go right then and she was told yes. Claimant took the money, clocked out and left. She testified that she clocked out because she was told that "any time we would leave the store, whether to run an errand or on a break, you were to clock out".[2] Claimant testified that she and Erica had talked about getting Java Chillers from Sonic earlier in the shift.

Claimant testified that she had gone to get refreshments from other restaurants for herself and others before while she was on her break. She also testified that she has been sent out on errands to get product for the store from another Braums before. Claimant testified that employees are allowed one 30 minute break during their shift and must be clocked out for the break. The managers are in charge of making sure all of the employees get their breaks and usually start with the person who was on shift first.

Claimant testified that on two prior occasions she had volunteered, purchased and brought Java Chillers in for Erica and Amber. On those occasions, claimant was on her break and was clocked out. Claimant was also clocked out on the date of the accident, but claims she was not on her break at that time and only clocked out because she was told that when you leave the store you must be clocked out. Claimant was driving her own vehicle and was not paid mileage. She states that it was not uncommon for workers to be sent on company errands, she couldn't say for sure whether those employees would clock out or not. Claimant doesn't know if Erica used the word errand or not, but she states she was in the middle of doing her job when Erica came by and handed her $20 and pointed to the door for her to go.

Claimant testified that when she was asked to go to Sonic she had only been on shift for about 2 hours so she hadn't thought about taking her break yet. There were a good number of customers at the time, so it wasn't the best time to leave. Claimant stated that she was planning on trying to take a break around 7 pm that night. Claimant testified that she assumed her time would be adjusted according to how long it took her to get to Sonic and back.

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[1] P.H. Trans. at 7-8.

[2] *Id.* at 12.

Claimant testified that she arrived at Sonic right before 4 pm at the end of happy hour. Because of the traffic she had to go around the block to attempt to get into Sonic's parking lot. As she entered the intersection to make her turn she was hit by a semi-truck that had run a red light.

When claimant called 911 she initially reported that she didn't think she was injured. The emergency personnel categorized the accident as a non-injury accident. Claimant was able to move her vehicle out of the busy intersection and waited for the police. Claimant then called Erica at Braums and reported that she was going to be late getting back because she had been in an accident. Claimant was told to go home. Claimant then called her insurance agent.

Claimant managed to drive her car home, which was a few blocks away and called Erica again. Claimant was told to take the rest of the night off. But claimant told Erica that she couldn't afford to lose the hours and needed to come back to work. However, claimant began to experience a heat sensation and numbness in her left shoulder and chest area. Claimant thought she was having a heart attack or a stroke. Claimant's ex-husband took her to the hospital. By the time claimant got to the hospital she also had pain in her neck and back.

After her ER visit, claimant met with her family physician, Dr. Sheri Reinhard and was given an off work slip, which claimant took into respondent. Claimant was sent to physical therapy. By the end of March 2011, claimant had not returned to work.

Claimant met with Dr. Prostic in April 2011, who prescribed physical therapy. After a short course of physical therapy, claimant stopped because of back pain and the fact that therapy was no longer benefitting her.

In August 2011, claimant was given a weight restriction of five pounds. Claimant was still not back to work and was told that she would require another 6 months to a year of treatment and therapy. Claimant stated that respondent would not hold her job for that long. Claimant continues to have problems with her left shoulder, neck and back throughout her treatment.

Erica Benner Garrity, an assistant manager for respondent, testified that in February 2011, she and others were training claimant to be a manager. Erica testified that although she and claimant were both managers she felt that she was the primary manager in charge because she had been there longer and claimant was still in training.

On the date of the accident, Erica and claimant had a conversation about Java Chillers at the beginning of their shift. It was not uncommon for the employees to bring in refreshments from other stores because there are times when you want something besides Braums.

Erica testified that on February 23, 2011, she talked with the claimant about going to get Java Chillers during their shift and gave her $20 of her own money to purchase the drinks. She did not tell the claimant when to take her break that day. She heard about claimant's accident from another employee and then later from the claimant when she tried to come back to work. Erica spoke with claimant the day after the accident, but doesn't recall telling her that she needed to have a release to return to work. She stated that she probably would have told the claimant to speak with Amber Cardwell. She testified that she understood that claimant had work restrictions, but she was never provided any doctors notes from claimant.

Erica testified that every employee gets a 30 minute break for which they must clock out. Employees may also take smaller 5 minute breaks and not clock out. She testified that there were times when company related errands were run by managers and they did not have to clock out for those. Company related errands would involve going to other Braums stores or the grocery store to get hamburger buns or cans of whipped cream.

Respondent had no control over claimant when she left the premises on a 30 minute break. While on her 30 minute break claimant usually grabbed something to eat and went home to check on her kids.

Amber Cardwell, manager for the Braums in Coffeyville, testified that in February 2011, claimant was training to be an assistant manager. Ms. Cardwell testified that every employee is required to clock out for a 30 minute break during their shift. During this 30 minute break, employees are free to go anywhere they want.[3]

She testified that on February 23, 2011, she became aware that claimant was in an auto accident, and that claimant sought medical attention for her injuries. Ms. Cardwell received a note stating that claimant would be reevaluated within a week of the accident It was her understanding that claimant could not return to work until after she had been reevaluated and cleared.

It was the day after the accident that Ms. Cardwell found out that claimant had been on her way to get Java Chillers from Sonic when the accident occurred and that Erica had given her money to get the Java Chillers. Ms. Cardwell testified that Erica called her and told her claimant had taken a break and her car was struck by a semi.

Ms. Cardwell never had claimant fill out an incident report, but she did notify the district manager about the situation.[4] If the incident had been considered workers

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[3] *Id.* at 82-83.

[4] *Id.* at 75.

compensation related, an incident report would have been filled out and sent to the corporate office.

Ms. Cardwell testified that there were times when the assistant managers would have to run errands for the company and they would stay clocked in. Those errands were to obtain supplies for the store from other Braums locations or from the grocery store. The items were paid for out of the cash drawer. The store never paid for any of the Java Chillers.

Ms. Cardwell testified that the claimant never brought her any paperwork regarding work restrictions. But after the accident claimant told her that she felt perfectly fine and capable of working and she was just waiting on her doctor.[5]

Ms. Cardwell testified that to her knowledge, claimant always clocked out for her break and when she didn't because she forgot, her time was adjusted. She could not say if claimant was directed to take her break when she did on February 23, 2011.

Ms. Cardwell testified that she learned claimant was making a workers compensation claim when she was forwarded an email on April 6, 2011. She made sure the district manager got a copy of the email and filed it away. She never asked claimant is she was returning to work because she was under the impression that claimant was not physically able to.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[7]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[8]

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[5] *Id.* at 86.

[6] K.S.A. 44-501 and K.S.A. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] K.S.A. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[9]

K.S.A. 2010 Supp. 44-508(f) states:

> (f) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.
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> The words, ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed
> by the employer.

K.S.A. 2010 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[10]

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[9] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[10] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

> The rationale for the "going and coming" rule is that while on the way to or from work, the employee is subject only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.[11]

But, K.S.A. 2010 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[12] Additionally, injuries that occur during short breaks on the premises of the employer are considered compensable.[13] Breaks benefit both the employer and employee.[14] In circumstances where the employee is taking a break in an area designated or permitted by the employer for such purposes, even if it is not on the employer's premises, there is also a degree of control sufficient to find the accident compensable.[15]

However, the analysis is different when dealing with lunch breaks, or breaks long enough to allow the employee to leave the premises and therefore be out of their employer's control.[16]

In this instance, claimant had clocked out and was on an extended 30 minute break. She had left the employer's premises and was driving on a city street at the time of the accident. Claimant, in that regard, was subject to the same risks and hazards as the general public.

Claimant contends that she had been ordered to leave respondent's business immediately to go to Sonic for the drinks. However, Ms. Garrity testified that, while she gave claimant the money for the drinks, claimant was not instructed as to the time when she was to leave. Additionally, it is clear that traveling to different fast food establishments to obtain different food than that at respondent's restaurant was an accepted practice among the workers. Claimant admitted that she paid for the drinks in the past.

It appears from this record that it was required that the person going for the drinks was to clock out. The duration of the break was significantly longer than a short 5-10 minute break on respondent's premises. The control that respondent would be able to

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[11] *Thompson v. Law Office of Alan Joseph*, 256 Kan. 36, 883 P.2d 768 (1994).

[12] *Id.* at Syl. ¶1.

[13] See Larson's Workers' Compensation Law Sec. 13.05(4) (2006).

[14] *Jay v. Cessna Aircraft Co.*, No. 1,016,400, 2005 WL 3665488 (Kan. WCAB Dec. 14, 2005).

[15] See Larson's Workers' Compensation Law, Sec. 21.02 (2006).

[16] See Larson's Workers' Compensation Law, Sec. 13.05 (1999).

exert on an employee on it's premises vanished the instant claimant clocked out and drove onto a city street.

This Board Member finds that claimant had left her employment at the time of the accident and was no longer under the control of respondent. The application of the "going and coming" rule is applicable to this matter. The denial of benefits was appropriate and that Order is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[17] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has failed to prove that she suffered personal injury by accident which arose out of and in the course of her employment with respondent. The denial of benefits in this instance was appropriate and is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated December 9, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March, 2012.

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HONORABLE GARY M. KORTE
BOARD MEMBER

c: Kala Spigarelli , Attorney for Claimant
Bret C. Owen, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge

[17] K.S.A. 44-534a.